

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SIMUEL E. FUNCHES,

Defendant-Appellant.

UNPUBLISHED

January 7, 2000

No. 207047

Eaton Circuit Court

LC No. 96-020339 FH

Before: Hoekstra, P.J., and McDonald and Meter, JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a fourth habitual offender, MCL 769.12(1)(a); MSA 28.1084(1)(a), to twelve to thirty years' imprisonment for the home invasion conviction and a consecutive two-year term for the felony-firearm conviction, with credit for forty-one days served. Defendant appeals as of right. We affirm.

Defendant first argues on appeal that his right to a unanimous verdict was violated. Specifically, defendant claims that the prosecutor failed to specify as to which of two criminal acts defendant was charged, and that the trial court failed to instruct the jury that it was required to render a unanimous verdict as to the same criminal act. Because defendant neither requested a specific unanimity instruction, nor objected to the general unanimity instruction as given, he failed to preserve this issue for review. MCL 768.29; MSA 28.1052; *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). We need not review this issue unless manifest injustice would result from failure to do so. *Paquette, supra*; MCL 769.26; MSA 28.1096. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence." *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993), and citing *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

Upon review of the record, we conclude that failure to give a specific unanimity instruction did not invite a wrongful conviction nor cast doubt on the fairness of defendant's conviction. Moreover, had defendant made a timely objection, a curative instruction could have readily corrected any potential misunderstanding in the minds of the jury. See *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996) ("Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct"). To the extent that defendant suggests that unanimity is required where the offenses allegedly committed were separate crimes, his argument is without merit. Defendant was charged with first-degree home invasion. Pursuant to MCL 750.110a(2); MSA 28.305(a)(2), the prosecution must prove beyond a reasonable doubt that defendant broke into and entered a dwelling with the intent to commit larceny while either armed with a dangerous weapon or while another person was lawfully present there. This Court has stated that "[w]hen a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory." *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996). Possession of a dangerous weapon or the presence of another while breaking and entering a dwelling with the intent to commit larceny are simply different aggravating factors to raise the offense to first-degree home invasion. MCL 750.110a(2); MSA 28.305(a)(2); *Asevedo*, *supra*. Upon review of the record, we find that the evidence supported a conviction of first-degree home invasion, whether supported by either factor. Likewise, the evidence supported a conviction for felony-firearm. To the extent that defendant suggests that armed robbery could have been an alternate charge, such argument is without merit. Armed robbery was neither charged, nor presented to the jury to decide, and therefore is irrelevant. Because we find no manifest injustice, we decline to review this issue further.

Defendant next argues that one juror, when polled, did not indicate on the record her assent to the verdict that the jury foreperson announced, and that the trial court's discussions with that juror in chambers, off the record and outside the presence of counsel, deprived him of his rights to be present at trial, to be represented by counsel and to a unanimous jury verdict. We disagree. Upon review of the record, it is clear that when polled, the juror in question responded "yes" to the court's inquiry as to whether the verdict read by the foreperson was and is her verdict. Because the record is clear on its face, we need look no further. Although the trial court may have had difficulty hearing the response, the record unequivocally reveals that she answered the court's inquiry in the affirmative. Moreover, defendant made no objection. Although defendant requests that we consider the trial court's actions after the polling, its statements during sentencing and an affidavit from the juror in question, we decline to address extraneous information when the record is clear. See *People v Pizzino*, 313 Mich 97, 105; 20 NW2d 824, (1945) (Although the reporter may not have heard a juror's affirmative answer during polling, the court did, and the juror's outward act is final); *Brillhart v Mullins*, 128 Mich App 140, 152; 339 NW2d 722 (1983) ("It was not within the jury's province to change its mind once the verdict was lawfully received"). Any further actions by the court and juror are irrelevant where the record clearly reveals the juror's assent to the verdict.

Next, defendant argues that he was denied his constitutional right to confrontation when the trial court refused to allow cross-examination of prosecution witness Gerald Williams regarding Williams' prior juvenile record. We disagree. We review a trial court's limitation of cross-examination for an abuse of discretion. *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996).

Generally, evidence of juvenile adjudications is not admissible; however, in a criminal case, the court may "allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the case or proceeding." MRE 609(e); see also MRE 403. Upon review of the record, it is apparent that the trial court considered defense counsel's arguments, recognized its discretion and determined that such was not necessary for the fair determination of the case. We find no abuse of discretion, nor did prejudice occur. Regardless, even if such were error, it was harmless, as the record reflects that multiple other grounds on which to attack the credibility of the witness were brought out during cross-examination.

Finally, defendant argues that he is entitled to resentencing because the trial court sentenced him for a crime for which he had not been charged and also failed to determine on the record defendant's habitual offender status. We disagree. A sentencing authority may take into consideration a defendant's earlier conviction, a pending charge, or an uncharged offense, provided that the defendant has had the opportunity to test the accuracy of those other allegations. *People v Ewing*, 435 Mich 443, 446 (Brickley, J.), 458 (Archer, J.), 462-463 (Boyle, J., joined by Riley, C.J., and Griffin, J.); 458 NW2d 880 (1990). Despite the trial court's apparent confusion at sentencing about the two offenses that allegedly occurred, even though only one was charged, it is clear from the record that the trial court considered the facts in evidence relating to both offenses. Defendant made no objection, neither offering corrections nor requesting clarification. Under the facts and circumstances in this case, it is perfectly permissible for the court to consider the uncharged offense. *Ewing, supra*. Further, although the court could have been more explicit about its determination of defendant's habitual offender status based on defendant's prior convictions, which the court addressed during sentencing, the record clearly indicates that defendant was properly charged and sentenced as a habitual offender. *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Gary R. McDonald
/s/ Patrick M. Meter